UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA,

Plaintiff,

-vs.-

LAWRENCE BECKER, et al.

Defendants.

Civil Action No.:
6:10-cv-06229-DGL-JWF

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW SUBMITTED IN RESPONSE TO THE COURT'S DECEMBER 1, 2011 ORDER

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PRELIMINARY STATEMENT

This Supplemental Memorandum of Law is submitted by defendants to respond to this Court's Order, dated December 1, 2011, requesting information as to whether the following four issues, which are related to the joint motion to dismiss the Amended Complaint filed by the defendants in a case entitled *Kunsman v. Xerox*, are also present in the instant action:

> (i) whether the Court can determine, as a matter of law from the face of the Amended Complaint in *Kunsman* at what point plaintiffs had actual knowledge of defendants' alleged breach of fiduciary duty;
>
> (ii) whether actual knowledge of the alleged breach of fiduciary duty of plaintiffs' counsel, Mr. Jaffe, may be imputed to the *Kunsman* plaintiffs;
>
> (iii) with respect to when the alternative six-year limitations period Section 413(1) begins to run, can the Court determine from the face of the Complaint when the last act constituting a part of the breach occurred? And whether plaintiffs have sufficiently pled fraud or concealment so warrant the six-year period running from the date of discovery; and
>
> (iv) whether the claims of the group of plaintiffs who sought to join the *Frommert* action in November 2006 by way of leave to file an Amended Complaint adding them to the action should be treated differently for limitations purposes as compared to the remaining plaintiffs.

As discussed in detail below, none of the above issues is present in or relate to the instant case. The first three issues which concern the statute of limitations to be applied to *Kunsman* plaintiffs' breach of fiduciary duty claims primarily because Plaintiff has not asserted a breach of fiduciary duty claim as such. Rather, he has interposed a claim for benefits under Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). (See Compl., FIRST and SECOND Claims).[1]

Plaintiff's Third and Fourth Claims are asserted pursuant to ERISA 502(a)(3), 29 U.S.C. 1132(a)(3)(B). In the Third Claim, plaintiff does not plead a cause of action or a factual basis of any claim, and instead, merely requests a remedy: that is, an order compelling defendants to

[1] References to the Complaint filed in this case are designated ("Compl." [paragraph number"]).

comply with a purported "direct order" of the Ninth Circuit in *Miller v. Xerox Corp. Ret. Income Guar. Plan ("Miller")*, 464 F.3d 871 (9th Cir. 2006). In the Fourth Claim, plaintiff seeks an order requiring Defendant Becker to "exercise his fiduciary duties" with respect to Plaintiff's benefit claim in an independent and appropriate manner (or issuing an order appointing a substitute fiduciary if Becker fails to do so). (Compl. ¶¶ 102).

Additionally, even generously assuming that Plaintiff's Third and Fourth Claims are intended to interpose breach of fiduciary duty claims, since it is clear from the face of the Complaint that the last act constituting a part of the breach of fiduciary duty occurred more than six years before the Complaint was filed, and plaintiff failed to sufficiently pled fraud or concealment, such claims would be time-barred regardless as to whether as to whether plaintiff had actual knowledge, through an attorney or otherwise.

With regard to the fourth issue, plaintiff was not a part of the 2006 motion for joinder filed in the *Frommert* action. Thus, the issue is not presented in the instant case.

ARGUMENT

ANY PURPORTED BREACH OF FIDUCIARY CLAIM IS TIME-BARRED

Even generously assuming for purposes of this motion that plaintiff has adequately pled a breach of fiduciary duty claim, which he has not, including sufficient facts to address the threshold question in every case charging a breach of fiduciary duty, that is, that each of the named defendants was acting as a plan fiduciary with regard to the alleged breach, *see Bell v. Pfizer, Inc.*, 626 F.3d 66, 73 (2d Cir. 2010), the conclusion that plaintiff's breach of fiduciary duty claim is time-barred is warranted because the latest date upon which plaintiff could have commenced an action was September 2004, and this action was not commenced until 2011, six years too late.

A. The Relevant Statutory Provisions

The relevant statutory provision governing the time period for commencing claims for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA") is Section 413, which provides, in pertinent part, that:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation of this part, *after the earlier of*–
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or omission; or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added).

B. Plaintiff Commenced this Action More than Twelve Years after the Alleged Breach or Violation and/or after the Breach or Violation Was Cured

As is evident from the face of the Complaint, plaintiff's claims are premised on alleged material misrepresentations or omissions relating to the methodology to offset prior distributions. (*See* Compl. ¶ ¶ 10-50). Plaintiff claims that these misrepresentations and omissions violated ERISA's notice requirements contained in Section 204(g) and (h), by using an offset methodology for prior distributions without adequately disclosing to plan participants that such methodology would reduce their benefits. (Compl. ¶¶ 39-42). As this Court is aware, in its 2006 decision in *Frommert v. Conkright* ("*Frommert*"), 433 F.3d 254 (2d Cir. 2006), the Second Circuit held that, by way of the issuance of the September 1998 Summary Plan Description ("SPD"), the Retirement Income Guarantee Plan ("RIGP") was properly amended to include the

offset provision for prior distributions and that SPD provided sufficient information as to how the methodology was being applied to calculate retirement benefits under the RIGP.

Based on the foregoing, in applying Section 413(1) (A) and (B), this Court must conclude that the last action that could have constituted the breach or violation of ERISA occurred prior to the issuance of the September 1998 SPD and that, by September 1998, the plan fiduciary had cured any alleged breach or omission. Thus, in the absence of fraud or concealment, of which none is alleged, the latest date by which Plaintiff could have timely commenced a breach of fiduciary duty claim was September 2004, pursuant to the six year deadline imposed by Section 413(1)(A) and (B). However, plaintiff did not commence this action until 2011, seven years too late. Accordingly, any breach of fiduciary duty claim he could have asserted is time-barred. *See Martin v. Public Service Electric & Gas Co.*, 271 F. App'x 258, 261 (3d Cir. 2008); *Keen v. Lockheed Martin Corp.*, 486 F. Supp. 2d 481 (E.D. Pa. 2007).

This result is consistent with the Second Circuit's decision in *Hirt v. Equitable Ret. Plan for Emples., Managers & Agents*, 285 F. App'x 802 (2d Cir. 2008). In that case, like this one, the plaintiffs' claimed were based upon an alleged failure to notify them of amendments to a pension plan which reduced their benefits in violation of ERISA Section 204(h). The Second Circuit affirmed the dismissal of the complaint on statute of limitations grounds because the plaintiffs had failed to sue within six years of having received an SPD clearly repudiating any pre-amendment benefits that plaintiffs could possibly claim. *Accord Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 414 (6th Cir. 2010) (refusing to grant a preliminary injunction in an ERISA case because the plaintiffs' claims were time-barred, reasoning that although "[e]nforcing a statute of limitations is never easy," such limitations period are designed to promote fairness concerns of their own, including that "no one should be forced to defend against a stale claim.").

Plaintiff's reliance on the decision of the Ninth Circuit in *Miller* to somehow revive his stale claim is misplaced. This Court can take judicial notice of the fact that Plaintiff was not a party to that action, and the *Miller* action was never certified as a class action. Moreover, the Ninth Circuit never issued a judgment or order with respect to Plaintiff.

C. Determining When Plaintiff Had "Actual Knowledge" is Unnecessary

As acknowledged by the Court in its December 1, 2011 Order, "[i]f the last act here occurred more than six years before the *Kunsman* complaint was filed in February 2008, then the fiduciary duty claim would be time-barred regardless of when plaintiffs learned of the breach, absent fraud or concealment. . .. " Decision and Order at 4. *See Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564, 570 (6th Cir. 2010)(even though an ERISA plaintiff alleging breach of fiduciary duty generally has six years within which to file suit, this period may be shortened to three years when the victim had actual knowledge of the alleged breach or violation); *Kopilas v. Dispigna*, 1992 U.S. Dist. LEXIS 5863, at *11 (S.D.N.Y. Apr. 28, 1992).

As demonstrated above, the last such act clearly occurred more than six years prior to the filing of the Complaint and therefore the Court need not resolve the issue as to when plaintiff had actual knowledge and/or whether knowledge by an attorney could be imputed to him because his breach of fiduciary duty claims are barred under Section 413(1) for reasons discussed above.

While the Court need not resolve the issue, there are facts pled in the Complaint that demonstrate that Plaintiff acquired actual knowledge of the facts related to a claim for breach of fiduciary duty by way of the 1998 SPD. Thus, under Section 413(2), plaintiff would have had to commence an action by 1998, and he did not do so. And assuming that he did not acquire actual knowledge until the *Miller* decision was issued in 2006, his claims would still be untimely

interposed because he did not commence an action within three years of the decision in the *Miller* upon which he relies. Accordingly, regardless as which date is used to trigger plaintiff's deadline to commence a breach of fiduciary duty claim, such claim is untimely and must be dismissed.

D. There Are No Allegations of Fraud or Concealment

Although the statutory time period for the commencement of suits contained in Section 413(1) and (2) contains an exception in cases where there is fraud or concealment, such exception is of no assistance to plaintiff. Under well-established law, to alleged fraud or concealment, a plaintiff's complaint must specify the time, place, speaker and content of the alleged misrepresentations. *Oechsner v. Connell Ltd. Pshp.*, 101 F. App'x 849, 851 (2d Cir. 2004); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001) (discussing Fed. R. Civ. P. 9(b)). A complaint must also specify how the misrepresentations were fraudulent and plead events that give rise to a strong inference that the defendant had an intent to defraud, knowledge of the falsity, or reckless disregard for the truth. *Oechsner*, 101 F. App'x at 851.

There are no such allegations in the Complaint. Even assuming for purposes of this motion only that the allegations in the Complaint were sufficient to fall within the fraud or concealment exception to statute of limitation contained in Section 413, which they are not, plaintiff's breach of fiduciary duty claims would still be time-barred. As recognized by the Supreme Court, although the plan administrator may have made a mistake in his interpretation of the RIGP's offset provisions prior to 1998, there has never been any finding by the lower courts that the plan administrator had acted in bad faith in doing so. *Conkright v. Frommert*, 130 S. Ct. 1640, 1648 (2010).

More importantly, for purposes of the instant motion, the Second Circuit in *Frommert*

held that the language of the 1998 SPD was sufficient to put plan participants on notice of the details of how the offset provision would be used in calculating pension benefits. *Frommert v. Conkright*, 433 F.3d at 260 ("[T]he details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description.").

As discussed above, a review of the allegations contained in the Complaint show that any alleged "fraudulent misrepresentations" about or "concealment" of the offset mechanism ended with the issuance September 1998 SPD. Accordingly, even utilizing the fraud and concealment exception to Section 413, Plaintiff had six years from September 1998 within which to sue. He did not do so, and any breach of fiduciary duty claim he may have attempted to plead is time-barred.

Because the Court did not ask for clarification or additional briefing of the other grounds supporting the pending motion to dismiss, defendants respectfully refer the Court to its prior motion papers in this case and request that the Court grant their motion to dismiss the Complaint in its entirety.

CONCLUSION

For the above reasons and in defendants' initial motion papers, defendants respectfully request that the court grant their Rule 12(b) (6) motion to dismiss the Complaint in its entirety.

Dated: December 22, 2011

/s/ Margaret A. Clemens
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